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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-675

HUBERT H. WILLIAMS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner Hubert H. Williams, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 27, 1972 and the request for rehearing denied on September 28, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of South Carolina.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 27, 1979. A timely petition for rehearing *en banc* was denied on September 28, 1979, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is involved under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Whether a person's state of knowledge, where such person is charged with violation of 18 U.S.C. §111 and such person was not engaged in any independent criminal activity, is a relevant and material jury consideration of criminal intent when he in good faith, because of ignorance of the Officer's identity, uses reflexive force against a plain clothes unknown United States deputy marshal attempting to serve process without properly identifying himself or his purpose, and whose conduct in approaching the person so charged from the rear and "touching" his person, might be reasonably interpreted as an unlawful use of force were the federal process server a private citizen.

2. Whether it was the intent of Congress to have a person, charged with a misdemeanor or simple assault of a United States deputy marshal while serving process, prosecuted under 18 U.S.C. §111.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18: §111

Assaulting, resisting, or impeding certain officers of employees

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in

section 1114 of this title (18 U.S.C.S. §1114) while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

United States Code, Title 18: §1501

Assault on process server

Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any legal or judical writ or process of any court of the United States, or United States commissioner (magistrate); or

Whoever assaults, beats, or wounds any officer of other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such writ, rule, order, process, warrant or other judicial writ or process–

Shall, except as otherwise provided by law, be fined not more than $300 or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

Hubert H. Williams, Jr., the Defendant here, along with Hubert H. Williams, Sr. and B & W Lumber Company, Inc. were Defendants in a Civil Action. (C.A. No. 76-1922) The action was for foreclosure brought by the United States Government (Small Business Administration) as Plaintiff. The action was filed on October 15,

1976 in the District Court for the District of South Carolina, Columbia Division.

The Summons and Complaint were delivered to the U.S. Marshall's Office in Columbia, South Carolina, for service. The Marshall's Office was delivered two copies of the Summons and Complaint for service on Hubert H. Williams, Jr. Special instructions had been left with the Marshall's Office requiring that one Summons and Complaint be served personally on Hubert H. Williams, Jr. with the notation that the action involved a Corporation with which Hubert H. Williams, Jr. was connected. In fact, Hubert H. Williams, Jr. was not connected with any Corporate Defendant.

Hubert H. Williams, Sr. had been served in the above referenced action and had delivered the Summons and Complaint to Hubert H. Williams, Jr. who in turn delivered same to his attorney in late October of 1976. His attorney communicated with the U.S. Attorney's Office and the Small Business Administration by mail and phone and negotiated a settlement of the action. Agreement for the settlement was confirmed on November 30, 1976, though the Deed in Lieu of Foreclosure (the settlement) was not actually filed until January of 1977.

From the time of the filing of the Summons and Complaint on October 15, 1976, the U.S. Marshall's Office made numerous attempts to personally serve Hubert H. Williams, Jr. In the course of these attempts, the Marshall's Office had learned that Hubert H. Williams, Jr., was employed out of the state of South Carolina and resided in Columbia with his wife and three children on the weekends. This information was obtained from Mrs. Doris Williams, wife of Defendant, and from Mr. and Mrs. Hubert H. Williams, Sr.

On Saturday, December 4, 1976, U.S. Deputy Marshall Walen L. Lamb, had the Summons and Complaint for service. At approximately 8:00 p.m., Deputy Lamb traveled to the residence of Defendant in an effort to effectuate service. He was unable to obtain any response at the residence of Defendant. Upon leaving Defendant's residence, Marshall Lamb traveled to the residence of Defendant's parents where he learned that Hubert H. Williams, Jr. was in the City of Columbia for the weekend. Lamb returned to the residence of Defendant and was met by two Officers of the City of Columbia Police Department. The police officers informed Lamb that they had a "prowler complaint" from the William's residence. Upon advising the officers of his identity and purpose, attempts to get a response from Defendant's residence were to no avail. Defendant's wife, Doris Williams, had reported to the City of Columbia Police Department that an unknown white male was in her yard and she was alone in the house with her children. When the police officers arrived, she spoke with them and was advised to "stay put" in the upstairs portion of the residence. The upstairs portion of the residence was the only part that was occupied by Petitioner and his family as the downstairs apartment was unoccupied.

The Defendant, who had been out for the evening of December 4, except for a brief return around 10:00 p.m., did not arrive at his residence until the early morning hours of December 5, 1976. He was advised by his wife of the incident the previous night and her call to the City of Columbia Police Department. The Defendant called the City of Columbia Police Department and was informed the the Officers who answered the call had learned the individual to be a U.S. Deputy Marshall.

Mr. Williams called the Federal Bureau of Investigation and was advised he would need to contact the Marshall's Office as the FBI had no information concerning him. The Petitioner sent a telegram to the home of U.S. Marshall J. Elliot Williams requesting that the Marshall's Service discontinue "harassing" Petitioner and his family.

Deputy Marshall Lamb had learned from conversations with the Defendant's parents that the Petitioner would fly out of Columbia on Sundays to his place of employment. On Sunday, December 5, 1976, around 2:00 p.m., Lamb traveled to the Columbia Metropolitan Airport and learned that Williams was scheduled to depart on a flight leaving the Airport at approximately 4:30 p.m. Lamb, who had never seen the Defendant, made arrangements with the Ticket Agents to signal him when Williams showed up and stationed himself about 10 feet away from the Ticket Counter. At approximately 4:00 p.m., or shortly thereafter, two black males approached the Ticket Counter and were being processed for flight. One of the Ticket Agents signaled to Lamb. Lamb approached one of the black males. The second had been processed and was departing the Ticket Counter in the direction of the Flight Gate area. Lamb approached the black male remaining at the counter and asked "Are you Hubert Williams, Jr.?" Upon learning from this individual and the ticket agent that the black male who had previously departed the Ticket Counter was Williams, Lamb turned his attention to the second black male who was proceeding in the direction of the Flight Gate with an elderly lady.

The particulars (and especially when and how Lamb apprised Williams of his capacity as U.S. Marshall) of what next occured, were in dispute at the trial. It was not in dispute that Deputy Marshall Lamb, in civilian clothes,

approached Mr. Williams and the elderly lady (later determined to be Mr. William's mother) from the rear and "touched" Williams on the left shoulder prior to any conversation or other contact. He testified he had his badge in one hand and the Summons and Complaint in the other. Lamb further testified that immediately after he "touched" Williams, he (Williams) spun around and struck him (Lamb) with his right fist in the chest area. At the same time, his testimony was that Williams was saying, "Take your hands off me, I don't know who you are, you've got no right to put your hands on me" and his mother was making similar statements. Williams testified he was spun around from behind and did not strike anyone with his fists although he did have contact with the individual who spun him around. He testified that the contact was made in an effort to prevent his losing his balance. He further testified he had never seen Lamb and saw no badge or other identification at that time. At any rate, any and all contact was minimal as no medical attention was required. Lamb and an Airport Security Guard placed Williams under arrest for "assault of a Federal Officer", and lodged him in the Lexington County, South Carolina, Jail.

At the close of the Government's case, Petitioner moved for Acquittal, which motion was denied. In the course of the argument on this motion, Counsel for both Petitioner and the Government presented their arguments on the question of scienter. Counsel for Petitioner contended that Petitioner's knowledge of the identity of Deputy Marshall Lamb at the time of the incident was an element of the offense which the Government must prove. The Government contended otherwise and Judge Simmons indicated very strongly at the time he was not inclined to give Petitioner's requested instruction.

At the close of the Petitioner's case, Petitioner renewed his motion for acquittal, which was denied. Counsel for both Government and the Petitioner inquired as to the Court's intention with regard to the scienter charge. The Trial Judge ruled at that time that "I'm going to charge the jury the scienter knowledge that the Defendant knew that he was allegedly assaulting a Federal Officer is not an essential element of the offense, irrelevant to the charges here."

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND THE HIGHEST COURTS OF SOME STATES AS TO THE PROPER INTERPRETATION OF 18 U.S.C. §111, AND THE STANDARD MISTAKEN BELIEF DEFENSE ENUNCIATED BY THIS COURT IN *UNITED STATES v. FEOLA*, 420 U.S. 671 (1975), APPEARS TO HAVE BEEN MISAPPREHENDED AND MISAPPLIED.

The Fourth Circuit in the instant case had misapprehended and misapplied this Court's mistaken belief defense enunciated in *United States v. Feola,* 420 U.S. 671 (1975). This has created an unnecessary conflict within the circuits. It has upheld the conviction of petitioner because he, in good faith, due to ignorance of the officer's identity, thought that he was acting in lawful and instinctive defense of his person and who used no more than reasonable force in effectuating that purpose. The conviction in the instant case was sent to the jury to find guilt by simple proof that petitioner in fact was impeding an officer in the performance of his duties. Notwithstanding the Petitioner's lack of mens rea, it was enough for a conviction in the instant case under 18 U.S.C. §111 to prove simply the natural consequences

of defendant's conduct, without any proof of a criminal intent.

This harsh interpretation of this Court's *Feola* decision poses substantial "risk of unfairness" to the petitioner and future litigants. It creates a legal "snare for the unsuspecting". In the instant case, the petitioner contended that his freedom of movement, within the public airport, toward his departing airplane was interfered with by an unknown individual approaching him from the rear. Neither petitioner nor the federal officer had ever seen each other before. And petitioner was not being sought for arrest or investigation by the officer; the officer was simply seeking petitioner for service of civil process. There was nothing illegal or wrongful in his "planned course of conduct." He was simply making his weekly trip into interstate commerce to his chosen place of employment. However, unbeknownst to the petitioner, he was about to become entangled in a classic "police state" crime. He was about to be transformed into a criminal, though he lacked *mens rea,* as a defendant, in a victim-precipitated crime. *See,* Gobert, *Victim Precipitation,* 77 Colum. L. Rev. 511, 514 fn.11 1977), where it is provided that a "victim-precipitated crime is an offense that would not have occurred except for the precipitated actions of the victim. Victim precipitation refers to some overt, identifiable conduct or omission on the part of the victim which provokes an individual to commit a crime".

Petitioner otherwise legitimate conduct became unlawful solely because of the identity of the individual or agent affected. He was in effect held absolutely liable for "assaulting" a government officer when he acted from the mistaken belief that he himself was threatened with an intentional tort by a private citizen.

The holding of the Fourth Circuit in the instant case is at war with the holding and qualification of the holding of this Court in *United States v. Feola, supra.* It also militates against the principles represented by all the cases cited approvingly by this Court in its qualification of the holding in the *Feola* case. In *Feola,* this Court concluded that Section 111 required a "criminal intent" in order to incur the criminal liability of that section of the U.S. Criminal Code. This Court also concluded that there may be circumstances, however, where "ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea". Id* at 686. The example cited by this Court in *Feola* is on all fours with the facts of the instant case. Here, the deputy marshall admits that he had not identified himself or his purpose when he approached petitioner from the rear and "touched" him before anything occurred. While the nature and severity of this intitial contact are in dispute, that the officer and petitioner were strangers to one another is not. The nature and degree of the initial contact notwithstanding, when the petitioner turned around, while being pulled through the airport by his mother on one arm and being "touched" on the shoulder on the other, while carrying a fatigue jacket and a briefcase, he was face to face with a rank stranger; an unidentified white man unknown to the petitioner without any outward symbol of authority in the South Carolina airport. It is reasonable to believe under the circumstances that he could have been thrown "off balance" or that he simply resisted the "stranger". Regardless, one might also believe that there was physical contact between these parties. But the evidence presented by both parties creates a reasonable doubt as to the nature and severity of this "touching" and when and by what method the officer identified himself.

Petitioner's defense was based on lack of intent as he in no way contended he had no contact with the officer, notwithstanding the Fourth Circuit's assertions to the contrary. See p. 9 of Appendix hereto. Yet the jury instruction excepted below prevented the jury from considering whether the petitioner's action was reasonable under the circumstance, thus negating criminal intent. Only by presenting to the jury the question of the petitioner's knowledge of identity as required by this Court's holding in the *Feola* case could fair consideration be given the essential and basic question of the existence of *mens rea.* This plain error below is so serious as to constitute a fundamental unfairness to the petitioner in the proceeding below and to future litigants. It is urged that this Court exercise its powers to maintain the integrity and public reputation in the judical administration of justice, by preventing the petitioner and other ordinary, law abiding, tax-paying citizens – from being wholesalely transformed into criminals.

This Court in the enunciation of its holding in *Feola* as to when knowledge of the official status of a federal officer was required as an essential element of the government's case, cited approvingly to decisions in the First, Second, Third and the Fifth Circuits. The decision of the Fourt Circuit in the instant case is at war with the principles enunciated in each of those cases. In *United States v. Perkins,* 488 F2d 652, 655, (1st Cir. 1973), the court concluded that:

> "In cases of non-assaultive interference with an officer, or of physical resistance sought to be justified as self-defense, if the defendant used no more than reasonable force, there would be no criminal intent

in the absence of knowledge of the officer's status. Hence in these situations proof of such knowledge would be a necessary part of the government case."

The First Circuit stated that the District Court had properly and adequately charged the jury that if they found the defendant to be ignorant of the officer's identity, he could not be convicted unless he used more force than was necessary to protect the person or property of himself or others. Since the trial court in the instant case charged that the jury could find the petitioner guilty of violating section 111 while also finding no assault occurred, this case must be considered in part a "non-assaultive interference" case. Further, as the petitioner sought to justify his physical contact as reasonable and lawful, knowledge of identity should have been an essential part of the government's case.

In *United States v. Ulan,* 421 F.2 (2nd Cir: 1970), also cited with approval in the *Feola* case, the Second Circuit held that, although a lack of scienter cannot be given the effect of an absolute defense to a section 111 violation, there can be a combination of circumstances which may provide a defendant with a defense through justification for his use of force. *Ulan* is not completely applicable to this case because the defendant there was a voluntary intervenor seeking to prevent the arrest of a co-demonstrator by a deputy marshal. However, the Second Circuit pointed out that one who is being unlawfully arrested has the right to use reasonable force against such arrest whether the arrest is being attempted by a peace officer or private citizen. In the instant case, the petitioner contended that his freedom of movement toward his deporting airplane was interferred with by an unknown individual approaching him from the rear. Surely, if one can lawfully use reasonable force to prevent an unlawful arrest, one should be allowed to use reasonable force to insure one's freedom of movement into interstate commerce en route to his place of employment; especially where no arrest is envisioned.

In *United States v. Young,* 464 F2d 160 (5th Cir. 1972), also cited with approval in *Feola,* the Fifth Circuit held that "when there is no doubt of the defendant's unlawful intention, knowledge of the official capacity of the victim is invariable unnecessary. . . ." However, the Fifth Circuit continued, "if the defendant asserts a lack of intention or willfulness based upon ignorance of the identity of the victim's official privilege to interfere with the defendant's person or freedom of movement, the jury must be allowed to consider the defendant's evidence tending to show that he was ignorant of the official capacity of the victim. For only then can the jury give fair consideration to whether the "assault" was an intentional act wilfully done without legal excuse. As already stated, in the instant case, the petitioner's defense rested on a lack of intent as he in no way denies having contact with the deputy marshal. He simply has contended that he did not intentionally strike the marshal with his fist. However, the charge excepted to prevented the jury from fairly considering whether the petitioner's conduct was "an intentional act wilfully done without legal excuse." Despite the obvious and plain conflict between the Fourth and Fifth Circuits, as to overall public policy concern for holding it plain error in a criminal prosecution to omit a knowledge instruction, the Fourth Circuit offers a specious distinction based on the consistency of the defendants' testimonies in their respected trials. *cf. Burke v. United States,* 400 F2d 866 (5th Cir. 1968); and *Pipes v. United States,* 399 F.2d 471, 478 (5th Cir. 1968) (Godbold, J,

concurring), where it was observed, "An unlimited rule of no knowledge would have to be restricted sooner or later in circumstances involving rights of citizens who are involved with persons they neither know nor have reason to know are federal officers."

In keeping with the above thrust, petitioner strongly urges this Court to take a serious and close look at the apparently tenuous distinction made by the Fourth Circuit in the instant case to prevent the gross injustice which will occur because petitioner neither knew nor had reason to know that he was being "touched" by a federal officer. In *Young,* the Fifth Circuit vacated the defendant's conviction for failure of the trial court to charge that knowledge of the official capacity of the person assaulted was an element which must be proven by the prosecution. In the instant case, the trial court was similarly confused, as was the trial court in *Young,* concerning the nature of the jury charge where there was evidence presented raising a reasonable doubt with respect to the defendant's state of knowledge of the victim official status. Previous decisions of the Fifth Circuit had held that knowledge was unnecessary. As have prior decisions of the Fourth Circuit *United States v. McGough,* 410 F2d 458 and *United States v. Wallace,* 368 F2d 537 (4th Cir. 1966). But the Fifth Circuit has held that section 111 was not an "absolute liability" statute, and where a defendant asserts a defense based upon lack of intent, the defendant is entitled to a charge requiring the issue of knowledge of identity to be submitted to the jury. Unfortunate for petitioner and future litigants, the Fourth Circuit maintains an "absolute liability" approach in its application and interpretation of section 111.

The *Feola* decision also cites with approval *United States v. Goodwin,* 440 F. 2nd 1152 (3rd Cir. 1971). The defendant there had asserted a defense based on mistake of identity. He contended that he thought the Federal Bureau of Investigation's agents, attempting to arrest him, were in fact bail bondsmen. The Trial Court charged that knowledge of the identity of the agents, on the part of the defendant, need not be proven by the prosecution. The Third Circuit held that, under the facts, such a charge ordinarily would be error. However, the Court pointed out that even had Defendant been correct in his mistaken belief, that the agents were bondsmen, such a mistake would not negative *mens rea.*

Though this Court rejected in *Feola, supra,* at 683 earlier contentions that section 111 was an "aggravated assault" statute, the severity of the alleged assault and the surrounding circumstances surely must be considered. Otherwise, it is impossible to determine whether "one might be justified in exerting an element of resistance." In this connection, it is important to note that the petitioner here was not charged with or being investigated concerning any unlawful conduct or civil disturbance when the incident which gave rise to the charge took place. He was not involved in a "classic narcotics ripoff" as in *Feola.* He was not involved in the operation of an illegal still nor alleged to have used a club or other object as in *Wallace.* He was not sought in connection with unlawful flight. nor any other criminal charge, as in *Goodwin* and *Young.* Nor was he charged with the use of a club and the firing of a rifle as in *Perkins.* He was not involved in any civil disturbance as in *Ulan.*

In fact, the incident here did not arise out of any purely law enforcement function. The incident occurred as a result of an attempt by the deputy marshal to

serve a Summons and Complaint while the petitioner was about his lawful business of traveling to his place of employment. The petitioner had previously received the Summons and Complaint from his father and the civil action had, for all practical purposes, been settled.

It is, therefore, understandable that petitioner, when he turned and saw the deputy marshal with his hands on his shoulders, dressed in plan civilian clothes, having approached him from the rear, without anything to identify himself, he reasonably could have assumed that the individual was some person unconnected with the United States Marshal Service, who may have been attempting to do him some bodily harm. Especially at a time when petitioner was seeking to catch his flight back to his place of employment and apparently not violating any law. *See Dotson v. State,* 358 So.2d 1321, 1323 (1978), where under facts similar to those in the instant case, the court held that the issue of whether the defendant knew or reasonably should have known, that the victim of the simple assault was an officer should have been submitted to the jury.

2.

THE DECISION BELOW FRUSTRATES THE INTENT OF CONGRESS TO HAVE A PERSON CHARGED WITH THE SIMPLE ASSAULT OF A UNITED STATES DEPUTY MARSHAL WHILE ATTEMPTING TO EFFECT SERVICE OF PROCESS PROSECUTED UNDER 18 U.S.C. §1501.

It is clear from an examination of the two statutes, 18 U.S.C. §111 and §1501, that Congress intended charges of simple assault of a Federal process server to be under §1501 and not §111. This Court has concluded in *U.S. v. Feola,* 420 U.S. at 679-686 that section 111 originated in §2 of the Act of May 18, 1934, c. 299, 48 Stat. 781. The history of the 1934 Act offers insight

into its multiple purposes, although the pertinent Committee reports consist largely of a letter dated 3 January 1934 from then Attorney General Homer Cummings. This letter was addressed to Senator Ashurst, then Chairman of the Senate Committee on the Judiciary, urging the passage of the legislation.[1] See *Feola* 420 U.S. at 680 fn. 16.; and *Ladner v. United States,* 358 U.S. at 174.

Section 1501 has its origin in §140 of the Act of March 4, 1909 cl. 321, 35 Stat. 1114, which was formerly 18 U.S.C. §245 referred in Attorney General Cummings' letter mentioned above. However, the current

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[1] In pertinent parts, the letter reads as follows:

"My Dear Senator: . . . Congress has already made it a Federal offense . . . to assault, resist, beat, wound; etc. any officer of the United States, or other person duly authorized, while serving or attempting to serve the process of any court of the United States (sec. 140, C.C.; sec. 245, title 18, U.S.C.) . . . "The need for general legislation of the same character, for the protection of Federal officer and employees other than those specifically embraced in the statutes cited above, become increasingly apparent every day. The Federal Government should not be compelled to rely upon the courts of the States . . . for the protection of its investigative and law enforcement personnel; and Congress has recognized this fact at least to the extent indicated by the special acts above cited. This Department has found need for similar legislation for the adequate protection of the special agents of its division of investigation . . .

In these cases resort must usually be had to the local police courts which affords but little relief to us, under the circumstances, in our efforts to further the legitimate purposes of the Federal Government. It would seem to be preferable, however, instead of further extending the piecemeal legislation now on the statute books, to enact a broad general statute to embrace all proper cases, both within and outside the scope of existing legislation. . . .

Respectfully,

"Homer Cummings,
"Attorney General"

§1501 was recodified, along with the current §111 (62 Stat. 688) §1 of the Act of June 25, 1948 cl. 645, 12 Stat. 769. By its plain meaning §1501 was intended by Congress to cover situations as presented in the instant case. And by it explicit language Congress has set forth the state of knowledge required to convict a defendant under such circumstances. In *Coleman v. U.S.* 268 F 468 (6 Cir. 1920), it was concluded that in order to establish under predecessor to 18 U.S.C. §1501 the offense of obstructing a federal officer the government had to show that the defendant knew the party was a federal officer on his way to serve legal writ in his possession; but to establish under the predecessor to a 18 U.S.C. §111 an offense of assaulting a officer, it was sufficient to show merely that the defendant knew the party was a federal officer.

However, in *Pietrzak v United States* 188 F 2d 418 (5th cir. 1951), the defendant was convicted under §111 because he used a deadly weapon (butcher knife) to assault a U.S. Deputy Marshal who was engaged in the performance of his official duties of serving civil process. The court in this case concluded that the use of a deadly weapon was made an element of section 111. The court distinguished indictments under the two statues as those under section 111 were to cover felonies and those under section 1501 to cover misdemeanors. Thus, in *Pietrzak,* the Government was free to bring the indictment under either statute because of the use of a deadly weapon and a choose of section 1501 was not deem sufficient to warrant a reversal.

However, the instant case can be distinguished from *Pietrzak* in that here no deadly weapon was involved. And, petitioner was not the aggressor, nor had the U.S. deputy marshal here expressly identified himself as was

the case in *Pietrzak.* Thus, petitioner should not properly have been charged with violating a statute intended for felonious offenses when there is a lesser offense which is more appropriate to his case, namely, section 1501 which covers misdemeanor offenses, and would not cause the petitioner to become a convicted felon for what he deemed to be non-assaultive interference.

A review of all the cases in the various circuits reveals that section 111 has been applicable only in situations where an accused planned course of conduct was wrongful, independent of any assault or resistance to an officer. Especially in those circumstances where a deadly weapon was used or excessive force employed against a federal officer while engaged in the performance of some investigative or law enforcement duties.

Although section III provides protection for U.S. Marshals, through section 1114, Congress has seen special need to provide protection for the function of serving process by U.S. Marshals and others by way of section 1501. This protection provides a federal forum for those who have obstructed or assaulted federal officers while performing their duties of serving process only. Section 111 was not intended to abrogate this special rule of section 1501. This is clear because Congress would have eliminated section 1501 when section III was enacted if it intended otherwise. Section III has a harsher penalty than section 1501. In circumstances where this Court has had doubt about the true intention of Congress with respect to the proper interpretation of a statute, it has applied a policy of lenity and adopted the less harsh meaning. *Ladner v. United States,* 358 U.S. 169. *See United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 212-222, where this Court stated:

> "[W]hen choice has to be made between two reading of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambigious implication."

And in *Bell v. United States,* 349 U.S. 81, 83, this Court expressed the following policy:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."

See also *Prince v. United States,* 352 U.S. 322; *Gore v. United States,* 357 U.S. 386, 391. This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. *Ladner v. United States,* 358 U.S. at 178. Clearly, if Congress intended to have an assault of a federal process server prosecuted under the harsher section III, and not section 1501, Congress would have made its meaning clearer or repealed section 1501 all together. Hence, the petitioner in the instant case was entitled to have had an opportunity for the jury to consider his state of knowledge before he was convicted. This is because the explicit language of section 1501 provides that the defendant's actions be done "knowingly and willfully." The government understood this fact and added "knowingly and willfully" to the indictment (under §111) while maintaining otherwise at trial. (See Appendix C, p. 10a).

Though the record and arguments by the parties in this case do not refer to 18 U.S.C. §1501, the district court and the court of appeals as well as this Court may take

judicial notice in regard to Congressional enactment. *St. Louis, I.M. & S.R. Co. v. Starbird* 243 U.S. 592 (1916); Missouri, *K & T.R. Co. v. Wulf,* 226 U.S. 570 (1912).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

JAMES W. COBB
1621 New Hampshire Avenue, N.W.
Washington, D.C. 20009
(202) 387-1100
Counsel for Petitioner.

Of Counsel:
WILLIAM A. BORDERS, JR.
DUDLEY R. WILLIAMS
ROBERT L. BELL
PEARSON LIDDELL, JR.

October 25, 1979

CERTIFICATE OF SERVICE

This is to certify that I served 3 copies of the foregoing Petition for a Writ of Certiorara upon the respondent, United States of America by mailing three copies thereof, in a duly addressed envelope, postage prepaid, to Thomas P. Simpson, Assistant United States Attorney, Columbia, South Carolina, and by mailing three copies of the same, in the same manner, to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 25th day of October, 1979.

JAMES W. COBB

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 77-1657

UNITED STATES OF AMERICA,

Appellee

v.

HUBERT H. WILLIAMS, JR.,

Appellant

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., District Judge.

Argued March 9, 1979 – Decided July 25, 1979

Before WIDENER and PHILLIPS, Circuit Judges, DUMBAULD,* Senior District Judge.

Dwight F. Drake for Appellant; Thomas P. Simpson, Assistant United States Attorney (Thomas E. Lydon, Jr., United States Attorney, on brief), for Appellee.

WIDENER, Circuit Judge:

The defendant, Hubert H. Williams, Jr., was convicted by a jury of assaulting a Deputy United States Marshal

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*United States District Court, Western District of Pennsylvania, sitting by designation.

in violation of 18 U.S.C. §111.[1] At trial, the defendant sought a jury instruction that knowledge that the victim was a federal officer is a necessary element of the offense without which he might not be convicted. The district court denied the defendant's request, and instead charged the jury that knowledge was irrelevant for a conviction under 18 U.S.C. §111. The defendant appeals, charging that the district court erred in its charge that knowledge of the victim's identity was irrelevant. We affirm.

The defendant was being sought by the United States Marshal in Columbia, South Carolina, who was attempting to serve a civil summons and complaint upon him.[2] Numerous unsuccessful attempts had been made to serve the papers on the defendant. On Saturday, December 4, 1976, Deputy Marshal Walen L. Lamb sought to serve the defendant by going to the defendant's home in Columbia. Although he had previously heard noises in the house, Lamb received no response upon approaching the house and identifying himself. Lamb then went to

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[1] 18 U.S.C. §111 provides in pertinent part:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5000 or imprisoned not more than three years, or both."

18 U.S.C. §1114 provides in part that any such person may be:

> ". . . any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, ..."

[2] The defendant along with his father, Hubert H. Williams, Sr., were being sued civilly by the Small Business Administration. Both complaints and summons were issued on October 15, 1976. Hubert Williams, Sr., was served in October.

the home of the defendant's parents, where he learned that the defendant worked out of the state during the week and that he was only in Columbia on weekends. Lamb also learned that the defendant would be flying out of Columbia the following day.

Lamb next went back to the defendant's home, only to learn that the defendant was still not at home. Local police officers came to the home, however, answering a prowler complaint filed by the defendant's wife. Lamb identified himself to the police officers and explained his purpose for being there. The city officers then attempted to get someone to come out of the house to speak with the deputy marshal but no one would.

The next day, December 5, 1976, the defendant learned from his wife of the events that transpired the previous evening. As a result, the defendant sent a telegram to the U.S. Marshal advising him to stop being belligerent to his parents and his family. Shortly thereafter, the defendant proceeded to the Columbia airport to catch his flight out of town.

That same day, Deputy Marshal Lamb proceeded to the Columbia airport to again attempt to serve the defendant. Lamb, who had never seen the defendant before, made arrangements with the ticket agent, who was to advise him when the defendant approached the ticket counter to be checked into his flight. Two men soon approached the ticket counter. Lamb misread the agent's signal and approached the latter of the two men. Upon learning from that man that he had approached the wrong man, Lamb then proceeded in the direction of the defendant who by this time was walking in the opposite direction toward the flight gates. Lamb had the civil papers in one hand and his credentials in the other. Approaching the defendant from the rear, Lamb tapped

the defendant on the right shoulder with the papers. The defendant then spun around and struck the officer in the chest. A local police officer, after seeing the incident, assisted Lamb in arresting the defendant.

At trial the defendant testified that the officer spun him around, causing him to lose his balance, and that he fell into the officer. He denied striking the deputy marshal. He also testified that the deputy marshal did not identify himself and did not have his credentials in hand.

At the end of the prosecution's proof, the defendant moved for acquittal on the ground that the prosecution had not proven all the essential elements of the crime because it had not proven that the defendant knew that the individual he struck was a deputy marshal. The court denied the defendant's motion. The case was submitted to the jury under the instruction that knowledge of the victim's identity was irrelevant. The defendant objected to this charge on the ground that knowledge is an element of the offense. The defendant requested no additional charges. A verdict of guilty was returned by the jury. The defendant argues that knowledge as to the identity of the victim is an essential element of the offense and therefore must be proven by the prosecution. We disagree.

As a general rule, Knowledge as to the identify of the victim is unnecessary for a conviction under 18 U.S.C. §111. *United States v. Feola,* 420 U.S. 671 (1974). In certain cricumstances, however, knowledge may be relevant consideration if it goes to disproving the necessary element of mens rea. The Court in *Feola* stated:

> "We are not to be understood as implying that the defendant's state of mind is never a relevant consideration under §111. The statute does require a criminal intent and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might reasonably be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent."

420 U.S. at 686.[3]

18 U.S.C. §111 was not enacted only as a counterpart to state laws requiring increased punishment for assaulting a peace officer where a defendant must know that his victim is an officer. Instead §111 was also designed to provide a federal forum for the trial of offenses involving federal officers. Requiring knowledge as an element of the crime, for example, would provide no protection for federal agents acting under cover. This offense was designed to protect both the federal officer and the law enforcement activities in which he is involved.[4]

In the instant case, had the evidence and his theory of the case suggested it, the defendant upon request might well have been entitled to a jury instruction relating to the exception set forth in *Feola.* But no such theory of defense was pursued; instead, the defendant took the

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[3] See also the pre-*Feola* cases of *United States v. Perkins,* 488 F.2d 652, 654-55 (1st Cir. 1973); *United States v. Goodwin,* 440 F.2d 1152, 1156 (3d Cir. 1971); and *United States v. Ulan,* 421 F.2d 787, 789-90 (2d Cir. 1970).

[4] For a discussion of the legislative history of 18 U.S.C. §111, see *United States v. Feola,* 420 U.S. 671, 677-84.

untenable position that knowledge is an element of the offense in each instance and therefore no request need be made.

The charge urged by the government and given by the district court was too broad upon the theory of the case now urged by the defendant in that it stated that knowledge was irrelevant. The defendant's suggested charge is equally too extreme on the theory in that he contended that knowledge as to the identity of the victim is an element of the offense and the absence of it should require acquittal.

The correct interpretation lies between these two extremes. Knowledge may in certain circumstances be relevant if it relates to the existence of the necessary mens rea to justify a criminal conviction. If the defendant felt that the circumstances here brought this exception into play, he could have urged that defense, but he did not.

Unlikely as it may seem in view of the record in this case, the jury could have believed from the defendant's acts (as described by the marshal), in contrast to the defendant's testimony, that the officer failed to identify himself and that the officer used unlawful force on the defendant, which force the defendant instinctively or justifiably resisted.[5] Therefore, had the case been tried on that theory, an instruction would have been proper taken from the above quoted language from *Feola.* But

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[5] In his testimony, the defendant denied striking the officer. Instead, he testified that the whole incident was an accident resulting from his losing his balance and falling into the officer. The defendant's mother also testified that she did not see her son strike the officer, as did two other witnesses called by the defendant. The inference sought to be drawn, of course, was that Williams did not strike the marshal.

the defendant did not choose that as an alternate theory of defense. Rather, he chose to defend the case on the theory that the entire occurrence was an accident and that he did not strike the officer at all. This was also a perfectly tenable theory from the testimony of the defendant.

While we do not hold or suggest that a criminal defendant may not adopt alternative defenses, even inconsistent ones, this defendant did not. He chose to try the case on the basis that his interference with the officer was accidental and that he did not strike the officer. We think the defense from *Feola,* that the defendant might reasonably be justified in asserting an element of resistance to an unlawful use of force directed at himself or his property, or that he had committed an honest mistake of fact in striking an officer, is in the nature of an affirmative defense which must be asserted in some manner at some point during the trial. Here, the defendant did argue the *Feola* exception, as it applies under a theory of self-defense, during his motion for acquittal outside the presence of the jury. This argument, however, was at the close of the government's evidence, when there was no evidence in the case to indicate mistake or self-defense. The defendant, moreover, never presented any testimony to support such a defense to the jury, but, in fact, based his entire defense upon the notion that the incident was an accident.

Thus, on the theory of the case adopted by the defendant, that the whole affair was accidental, the instruction of the district court is not erroneous for it complies with the holding in *Feola* that knowledge of the identify of the officer is irrelevant.[6]

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[6] We had held prior to *Feola*, in *United States v. Wallace*, 368 F.2d 537 (4th Cir. 1966), that knowledge was not an essential element of the crime.

To give the defendant the benefit of the doubt, we consider that he argues on appeal that a trial court should give a charge, based on the earlier quoted language from *Feola,* in any case and that failure to do so is plain error. We do not agree. We do not believe it is plain error for a trial court to fail to instruct a jury on an optional defense when the testimony of the defendant himself is inconsistent with the defense offered. We have taken into account the testimony of the defendant that he did not strike the officer and the fact that he chose not to raise this theory of defense at trial. FRCrP 30, 52(b). See *Kotteakos v. United States,* 328 U.S. 750, 758-766 (1946).

While the trial court is under a duty to instruct the jury on all of the elements of an offense in a criminal trial,[7] it is certainly not required to instruct the jury on a defense the theory of which is not even supported by the testimony of the defendant adduced at trial. Wright & Miller, 2 *Fed. Prac. & Proc.* §485 (1969); *United States v. Garner,* 529 F2d 962 (6th Cir. 1976). See also *United States v. Swallow,* 511 F2d 514 (10th cir. 1975).

Accordingly, the judgment of the district court is affirmed.[8]

AFFIRMED.

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[7] *United States v. Harris,* 346 F.2d 182 (4th Cir. 1965).

[8] Because the testimony of the defendant in *United States v. Young,* 464 F.2d 160 (5th Cir. 1972), was consistent with mistake, we do not think that case, holding it plain error to omit a knowledge instruction, is inconsistent with our holding. So far as the two cases may be read as inconsistent, however, with respect, we simply disagree.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 77-1657

UNITED STATES OF AMERICA,

Appellee

v.

HUBERT H. WILLIAMS, JR.,

Appellant.

ORDER

We have considered the petition for rehearing and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition shall be, and the same hereby is, denied.

With the concurrences of Judge Phillips and Judge Dumbauld.

/s/
For the Court

[Filed September 28, 1979]

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Criminal Number 76-313
18 USC 111 and 1114

UNITED STATES OF AMERICA
v.
HUBERT H. WILLIAMS, JR.

INDICTMENT

MAXIMUM SENTENCE THIS COUNT FINE OF $5,000 AND/OR XMXMXMXMXMMMM 3 YEARS, OR BOTH

That on or about the 5th day of December, 1976, in the District of South Carolina, HUBERT H. WILLIAMS, JR., unlawfully, knowingly and willfully did forcibly assault, resist, oppose, impede, intimidate and interfere with Waylen L. Lamb, a Deputy United States Marshal, a person designated in Section 1114 of Title 18, United States Code, while the said officer was engaged in the performance of his official duties, all in violation of Title 18, United States Code, Sections 111 and 1114.

A True Bill

/s/ David Mitchell
FOREMAN

/s/ Mark W. Buyck, Jr.
UNITED STATES ATTORNEY

TPS

APPENDIX D

United States of America vs. United States District Court for

DEFENDANT: HUBERT H. WILLIAMS, JR. — DISTRICT OF SOUTH CAROLINA, Columbia Division

DOCKET NO. Cr. 76-313

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH DAY YEAR — March 29, 1977

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Dwight F. Drake, Esq., retained. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY entered December 22, 1976,

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY., on March 17, 1977,

Defendant has been convicted as charged of the offense(s) of violation of Title 18, U. S. Code, Sections 111 and 1114, as charged in the Indictment,

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months.

FILED
APR 01 1977
MILLER C. FOSTER, JR. CLERK

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

TRUE COPY
Test:
MILLER C. FOSTER, JR. CLERK
By: Deputy Clerk

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

UNITED STATES DISTRICT JUDGE
Date March 31, 1977.

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APPENDIX E

[134] MR. SIMPSON: Your Honor, that's the government's case. The government rests.

MR. DRAKE: We have a motion we would like to make, Your Honor.

THE COURT: Mr. Foreman, ladies and gentlemen I will have to ask you to leave the courtroom for a few minutes while we discuss a legal matter, please.

(Whereupon, the members of the jury leave the courtroom and the proceedings continue in the absence of the jury.

THE COURT: All right, Mr. Drake, the jury is on the outside.

MR. DRAKE: Yes, Your Honor. May it please the Court, at this time the defense would move for judgment of acquittal for the defendant on the grounds that the government has not proved their case to the point that it should go to the jury and they have not established the essential elements of the case, and that it is obvious that what, if [135] anything, occurred was that Mr. Williams was acting in the reasonable belief—a case of mistaken identity because he did not know who the individual was who approached him from behind and any actions that he may have taken as were presented by the government were in defense of himself and reasonable defense of himself, and he was therefore acting in a reasonable, lawful manner in defending himself from someone whom he did not know, by the government's own witnesses did not know who it was who approached him from the rear, and on that basis we move for a judgment of acquittal.

THE COURT: Well, what do you have here? You have plenty of testimony that Marshal Lamb had conferred with Mrs. Williams, the mother, who was with

the defendant at the Airport and after they had, after Mr. Williams had finished registering in for the flight he and his mother started getting away in a hurry, according to Mr. Daniels, and the mother surely knew who Mr. Lamb was and there is plenty of basis for a reasonable inference that the mother was trying to, as I recall the evidence, was trying to push him on away to get him away from Mr. Lamb. Wasn't the evidence in reference to Mr. Lamb that he goes up and merely taps him on the shoulder with his credentials out and says, "I'm a United States Marshal", and then he wheels around the shoves him and hits him in the chest with his fist? If that's not adequate proof on which the jury, taking the evidence surely most [136] favorable to the prosecution as I must consider it, could find this defendant guilty beyond a reasonable doubt. I don't think there's any argument on that fact.

MR. DRAKE: Thank you. Your Honor.

THE COURT: Anything you want to say?

MR. SIMPSON: No, sir, Your Honor. Of course we take the position under the law and the Supreme Court has held since that time, that it's not necessary . . .

THE COURT: I don't think he had to know it was a United States Marshal. The prosecution has to prove that the defendant unlawfully knowingly and wilfully assaulted Mr. Lamb and that he was acting in his official duty as a United States Marshal. I don't think that the prosecution has to necessarily prove, but I think that there is plenty of evidence from which the jury could find that the defendant knew that he was a United States Marshal, but I don't understand the law to mean that the prosecution has to prove that Mr. Williams knew that he was a Marshal when he assaulted him.

MR. DRAKE: Well, Your Honor, we take the position that in this kind of case this is a set of circumstances without line in the United States Supreme Court case of U.S. versus Ferror in which the government would have the burden of proving that the knowledge on the part of Mr. Williams that the individual was a United States Marshal. [137] Now it is true that in that case the Court made statements and the general holding was that scienta was not an element but they went on to say in the last part of that that, "We are not to be understood to be implying that the defendant's state of knowledge is never a relevant consideration under 111. The statute does require criminal intent and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of (inaudible word). For example, where an officer fails to identify himself or his purpose. And situations of this kind one might be justified in exerting the element of resistence as an honest mistake of fact which would be consistent with criminal intent." They go further and cite a series of cases in support of that where the courts have held, starting with U.S. Versus Perkins 488 F.2d 654 and 655, that there are, however, situations where the court approved these cases; that there are, however, situations in which the defendant's lack of knowledge of the agent's status will be relevant, and that no court that we are aware of has held that a defendant who in good faith because of ignorance of the officer's identity believes that he is acting in lawful defense of his person or property and uses no more than reasonable force in effectuating that purpose . . .

THE COURT: There is no evidence here at all that I can recall that Mr. Lamb did anything out of the [138] ordinary insofar as the defendant was concerned that

would be any justification for any type of assault and battery, according to the evidence, committed on him.

MR. DRAKE: Well, I think it is obvious from the testimony of some of the government's witnesses that they were uncertain whether Mr. Williams hit Mr. Lamb or Mr. Lamb spun him around or what. It could be that . . .

THE COURT: Well, you have Mr. Lamb's testimony and you have Mr. Daniels' testimony which is unequivocal, you have the Metropolitan Police Officer's testimony. All that any of them said was that Mr.—the most that Mr. Lamb did was when he came up from the rear tapped him on the shoulder and held out his credentials and said, "I'm a United States Marshal", and the defendant wheeled around and shoved him and bang, right in the chest.

MR. DRAKE: Some of the witnesses, specifically Officer Marier, did not see how Mr. Lamb approached the defendant. He testified . . .

THE COURT: He said when he saw him he just had his hand . . .

MR. DRAKE: But he didn't see what occurred before.

THE COURT: Well, of course, Mr. Daniels said he did.

MR. DRAKE: Yes, sir. Mr. Daniels also said [139] he couldn't be certain whether Mr. Lamb spun him around or not.

THE COURT: Well, you have Mr. Lamb's testimony. After all, it's up to the jury to pass upon the credibility of the witnesses. My goodness! That's not within my . . .

MR. DRAKE: I certainly understand that. I'm just saying we are entitled to the defense of self-defense and part of that . . .

THE COURT: I surely wouldn't charge any self-defense on what I've heard.

What do you say about this matter of scienta. He says in certain circumstances . . .

MR. SIMPSON: I think that's true, Your Honor, but in this case you have got repeated contact with the mother and father and with the wife; you have got a telegram sent at 3:18 within a period of less than 45 minutes according to the government's contention, which is from Mr. Williams and says he knows that the Marshals are looking for him. You have got the testimony of Mr. Marier saying he had his credentials in his hand. I don't think there is any question in this case that there is substantial evidence.

THE COURT: I don't think there is any doubt [140] that there is plenty of facts in the record from which the jury could reasonably conclude beyond any shadow of a doubt so far as I'm concerned that the defendant did know that Mr. Lamb was the Marshal, but the only point I'm asking is do you agree with his proposition that the matter of scienta is necessary element.

MR. SIMPSON: No, sir.

THE COURT: I think there is plenty of evidence here that Mr. Williams did have that knowledge, but . . .

MR. SIMPSON: As I read the Felloya case, Your Honor, which is a recent proclamation of the United States Supreme Court which is found in 420 U.S. starting at page 671, the Court specifically holds. This went up on a very interesting theory. I won't take but a second, Your Honor. The defendants were tried in the District Court for a violation of 371 conspiracy and for a violation of 111 and there had been a line of decisions saying in the Circuits that you had to have knowledge to be guilty to conspire. That went to the

Circuit Court of Appeals reversed as I recall, and the issue went to the Supreme Court merely on whether or not you had to have scienta to violate 371 conspiracy to ultimately violate 111. The Supreme Court for that reason had to go to 111 and say what it required because it held to conspire would not require any greater knowledge than the substantive offense. [141] And they very clearly hold that scienta is not—now they do say there are certain circumstances under which a man could act in absence of knowledge but I don't think certainly that is the case here. And I think it would be improper to instruct this jury, as Your Honor has indicated.

THE COURT: That's all I'm concerned about right at this moment is what to instruct this jury. I'm surely not concerned about the fact that there is more than adequate evidence to be submitted to the jury.

MR. DRAKE: We would, of course, request to be heard further before the jury is charged, before we discuss what the instruction is going to be because I think the cases hold that we are entitled to that.

THE COURT: Of course, I think I understand your position and if I do not charge scienta is necessary why you can except to it, surely.

All right, bring the jury back, please.

How many witnesses do you expect to put on the stand?

MR. DRAKE: There is going to be seven or eight. Most of them will be brief witnesses.

(Whereupon, the members of the jury returned to the courtroom and the proceedings continued in the presence of the jury.)

THOMAS O. KETCHIN, III, being called as a witness for and on behalf of the defendant, having been

* * *

[279] THE COURT Well, for the reasons stated before, I would overrule your motion.

MR. DRAKE: Thank you, Your Honor.

MR. SIMPSON: Your Honor, prior to making arguments—I will make it as brief as I can—counsel for both the government and the defendant would like to know Your Honor's intentions with regard to the scienta charge.

THE COURT: I have looked over cases here and I have come to the very firm conclusion that scienta is not an essential element. The supreme court in a recent decision, United States versus Feola, decided March 19, 1975, said, "In order to effectuate the congressional purpose of according maximum protection of federal officers by making prosecution for assault upon them cognizant in federal court, section 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer. All the statute requires is an intent to assault, not an intent to assault a federal officer." The Fourth Circuit's opinions and many other circuits have held the same thing, so I'm going to charge the jury that scienta knowledge that the defendant knew that he was allegedly assaulting a federal officer is not an essential element of the offense, irrelevant to the charges here.

MR. DRAKE: Thank you, Your Honor.

* * *

[288] 1114: "Any United States Marshal or Deputy Marshal or persons employed to assist such marshal or deputy marshal, are covered by this Section 111."

Now, ladies and gentlemen there are two essential elements which the prosecution must prove in order to establish guilt of this defendant, and these essential elements, of course, must be established to your satisfaction beyond a reasonable doubt. First, that the act or acts of forcibly assaulting or resisting or opposing or impeding or interfering with the Deputy Marshal, Mr. Lamb, while he was engaged in the performance of his official duties as charged in this indictment, and secondly that the defendant did these acts wilfully and knowingly and intentionally.

Now, those are the two factual issues which you must determine from the evidence presented to you in this case. If each of these, both of these elements have not been established to your satisfaction beyond a reasonable doubt in your mind then you must acquit the defendant. On the other hand if you are satisfied beyond a reasonable doubt that both of these elements of this offense have been established then it would be your duty to convict this defendant.

Now I further charge you, ladies and gentlemen, that in order to effectuate the congressional purpose of according maximum protection to federal officers in the [289] performance of their duties, section 111 which I have just read to you does not require proof by the prosecution that a defendant in a charge for assaulting or impeding or intimmidating or interfering with a federal officer actually knew that such person was a federal officer at the time of such alleged act. So I would tell you that it is immaterial in this case whether the defendant actually knew Mr. Lamb was a Deputy U.S. Marshal at the time he allegedly committed the acts charged against him in this indictment.

Now any willful attempt or threat to inflict injury upon the person of another when coupled with the apparent present ability to do so and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm constitutes an

assault as that term is used in this statute. An assault may be committed without actually touching or striking or doing bodily harm to the person of another. So a person who has the apparent present ability to inflict bodily harm or injury upon another person and wilfully attempts or even threatens to inflict such bodily harm may be found guilty of forcibly assaulting the other person.

Now you have heard the evidence in this case. There is evidence that the defendant actually assaulted or struck the Marshal and there is evidence from him, his witnesses, that he did not. So that's where you come in. You must [290] resolve this conflict in the testimony. I would also charge you that a person who knowingly, intentionally and wilfully resists, opposes, impedes, intimmidates and interferes with a federal Marshal while engaged in the performance of his official duties may be found guilty of violating this section 111 even though no assault actually took place, and even though such person does not actually know such person to be a federal Marshal.

Now to constitute the crime charged in this indictment there must be the joint operation of two things: One is the doing of an act forbidden by law and the other is the intent to do the act. Thus before the defendant may be found guilty of the crime with which he is charged the prosecution must establish beyond a reasonable doubt that this statute which I have just read to you prohibited the defendant from doing the acts charged in the indictment, and further that the defendant intentionally and voluntarily committed these acts. When I say these acts, I mean act or acts. The proof of any one of those acts would be sufficient. In order to establish the requisite intent on the part of a

defendant under section 111 which I just read under which this defendant is charged the prosecution is only required to establish that the defendant knowingly, intentionally and voluntarily committed the act or acts with which he is charged.